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In The

Supreme Court of the United States

OCTOBER TERM, 1986

SAMUEL RUSSOTTI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER, SAMUEL RUSSOTTI

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QUESTIONS PRESENTED FOR REVIEW

1. Is Federal Rule 804(b)(1) on its face, and as interpreted by the Court in this case, violative of a criminal defendant's constitutional rights to compulsory process and due process of law, where the application of the rule prevents the introduction of exculpatory prior sworn testimony of two key witnesses unavailable to the defense at the time of the trial.

2. The lack of counsel for the petitioner Marotta, in this setting, affected the rights of all the petitioners to effective assistance of counsel in violation of the Sixth Amendment.

3. The New York corroboration of accomplice testimony requirement is incorporated by law in a Federal RICO prosecution and that requirement was ignored in this trial.

4. The testimony of a police officer which was eventually stricken was so highly prejudicial as to require reversal.

5. Consecutive sentences may not be imposed for conspiracy and substantive violations of RICO.

LIST OF PARTIES

The parties to the proceedings below are the petitioner SAMUEL RUSSOTTI, JOHN F. HUMANN, of Counsel, 736 Brisbane Building, Buffalo, New York 14203, and co-defendants, DONALD J. PAONE, EDWARD M. CHIKOFSKY, of Counsel, 41 Madison Avenue, New York, New York 10010, ANTHONY M. COLOMBO, ROBERT M. MURPHY, of Counsel, 112 Franklin Street, Buffalo, New York 14202, JOSEPH R. ROSSI, HERBERT L. GREENMAN, of Counsel, One Niagara Square, Buffalo, New York 14202, THOMAS E. MAROTTA, JOSEPH LaTONA, of Counsel, 300 Statler Towers, Buffalo, New York 14202, RICHARD J. MARINO, PAUL J. CAMBRIA, JR., of Counsel, One Niagara Square, Buffalo, New York 14202, and RENE PICCARRETO, HAROLD J. BOREANAZ, of Counsel, 736 Brisbane Building, Buffalo, New York 14203 and the respondents SALVATORE R. MARTOCHE, United States Attorney, Western District of New York, U.S. Courthouse, 25 Niagara Street, Buffalo, New York 14202 and WILLIAM C. BRYSON, Special Counsel, Department of Justice, P.O. Box 14263, Ben Franklin Station, Washington, D.C. 20044.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgement of the Court of Appeals for the Second Circuit of New York entered on February 5, 1986, affirming petitioner's convictions for substantive and conspiracy violations of the RICO statute (18 U.S.C. Sec. 1962(c) and (d)).

OPINION BELOW

Petitioner was found guilty by a jury in the Federal District Court of the Western District of New York and sentenced to serve 40 years, 20 years each, on the RICO substantive and conspiracy convictions. Petitioner's conviction was affirmed on appeal by the Second Circuit Court of Appeals in an opinion published at 782 F.2d 386.

On March 24, 1986, a motion seeking rehearing en banc was denied.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1). Petitioner's conviction was affirmed on February 5, 1986, and this petition was filed timely, within 60 days of the order denying the petition for rehearing en banc.

STATUTE INVOLVED

Federal Rules of Evidence:

"Rule 804. Hearsay Exceptions; Declarant Unavailable

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination."

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (Sixth Amendment).

"No person shall be deprived of life, liberty, or property, without due process of law . . ." (Fifth Amendment).

STATEMENT OF THE CASE

The petitioner was convicted on federal RICO violations based primarily on the hearsay testimony of immunized government informants. This petition draws into question the constitutionality of that portion of Federal Rule 804(b)(1) which *prevents* a criminal defendant from utilizing the prior sworn testimony of an unavailable witness unless the prosecuting agency at the prior proceeding was identical to the one prosecuting the instant case. This prohibition applies even if the former, but different, prosecutor "had an opportunity or similar motive to develop the testimony". (See Federal Rule 804(b)(1)). The rule is different and more stringent for criminal defendants than it is for civil litigants.

The application of the rule in this trial was particularly unfair since the petitioner was subjected to numerous exceptions to the hearsay rule which caused the admission of such evidence as:

1) admissions of co-conspirators "during the course of and in furtherance of the alleged conspiracy" (Rule 801 (d)(2)(E)).

2) statements of others which were "instructions" or "suggestions" and therefore not subject to hearsay restrictions because such utterances did not assert facts.

3) statements of others which were "recruiting" statements or "instruction" statements, and therefore not in violation of the hearsay rule and therefore admissible against the defendants.

4) declarations of others against penal interest.

With this background of hearsay testimony admitted against the defendants in the case, when it came time for the defense to offer some hearsay in their favor, the application of the Rule prevented the admission of the proof. The prior sworn testimony of two non-testifying defendants concerning two of the charged "acts of racketeering" was ruled inadmissible when offered by their co-defendants. *This was so even though the identical testimony would have been admissible against the defendants if the government chose to offer it.*

The substance of the offer

The testimony that was offered included the trial testimony of the co-defendant Piccarreto and the state grand jury testimony of the co-defendant Colombo.

Piccarreto testified in November of 1976. He was on the witness stand for the better part of a day. The exhibit offered constituted the entirety of his testimony consisting of appropriately 140 pages, about 100 pages of which was extensive cross-examination by the state prosecutor.

The cross-examination went well beyond the crime charged in the state indictment, the murder of Massaro. The cross dealt with the social clubs involved in the case here at issue; and it dealt with Piccarreto's relationship with his co-defendants Russotti and Marotta. As a matter of fact, the cross-examination included in the offer went well beyond what would have been allowed had the witness actually testified in this case. Piccarreto was asked about each of the nine arsons which were the subject of an earlier RICO indictment, then a pending case. At the time of this trial he had already been tried and acquitted on those charges. He was asked about events which constituted the facts in several other then pending indictments. By the time of this offer he had been cleared of all these charges.

This testimony went well beyond simply denying his participation in the Massaro homicide which was a predicate act in this RICO trial. The testimony directly contradicted the *only* government witness, Monachino, who testified relative to this predicate act. The cross was so extensive and, in fact, improper, that it caused the defense to move for a mistrial in that case. Despite all of this, the defense here did not attempt to limit the offer or to restrict it in any way.

Monachino was the only witness who gave testimony about the Massaro act of racketeering. The key part of his testimony, as it concerned the petitioner, was his claim that a meeting occurred at Longview Terrace wherein he was ordered by 'the bosses' (Piccarreto, Russotti and another co-defendant) to kill Massaro. Piccarreto testified there was no such meeting; that it never occurred; and that Monachino was a liar. He chose not to testify at this trial. Therefore, his prior sworn testimony was offered by the petitioner. It should be noted that the meeting which Monachino claimed occurred at 45 Longview Terrace was the subject matter of perjured testimony of law enforcement officers in the state

Massaro murder trial which caused the vacating of that conviction.

The co-defendant Colombo's grand jury testimony should have been admitted for many of the same reasons as Piccarieto's trial testimony. It was sworn testimony developed by a state prosecutor. It directly contradicted the testimony of Oliveri on a charged act of racketeering. The testimony concerned the March 13, 1979, Oskie DiMarco incident which was an 'act of racketeering' charged against all the defendants in this case. This 'act of racketeering' affected both the substantive and the conspiracy counts. Colombo underwent extensive questioning by the Monroe County District Attorney's Office concerning the incident. Colombo denied seeing any weapons that evening; or throwing any weapons out the car window; or having any knowledge of ski masks, *all in direct contradiction of the Government informant Oliveri.* He was asked directly whether or not he had any conversations with anybody concerning killing Oskie DiMarco and answered: "definitely not, no". The court asked the government if the testimony was exculpatory and government counsel agreed that it was. The court sustained the objection of the government to the Colombo testimony, holding that "it's only exculpatory self-serving statements", and that "Colombo was a defendant in this case" and therefore he was not allowing the offer.

If Colombo had testified before a federal grand jury, there would be no argument against the testimony. Under the circumstances of this case, the fact that it was a state and not a federal grand jury is a matter of form and not substance.

In *United States v. Pizarro,* 717 F.2d 336 (7th Cir. 1983), the Court was guided by the Supreme Court's statement in *Chambers v. Mississippi,* 410 U.S. 284 (1973), that "few rights are more fundamental than that of an accused to present witnesses in his own defense." Where a court erroneously excludes "testimony that would have been relevant and material, and . . . vital to the de-

fense," *Washington v. Texas,* 388 U.S. 14, 17 (1967), thus rendering the defendant's case "far less persuasive than it might have been," *Chambers v. Mississippi, supra,* 410 U.S. at 284, then a new trial must be provided. *United States v. Benveniste,* 564 F.2d 335, 342 (9th Cir. 1977). See *Pizarro, Id.* at p. 351. The Supreme Court has termed this right "a fundamental element of due process of law." *Washington v. Texas, supra.*

REASON FOR GRANTING THE WRIT

As promulgated and as approved by the court of appeals in this case, Federal Rule of Evidence 804(b)(1) is unconstitutional on its face. The existence of such a situation presents special and important reasons for review by this Court.

Its application bars a criminal defendant from introducing prior exculpatory testimony of an unavailable witness. It violates the sixth amendment right to compulsory process and assistance of counsel and the fifth amendment right to due process of law. It allows a prosecutor to use prior testimony against a defendant in a situation where the identical testimony could not be utilized by a defendant in his defense.

This jury deliberated for five days. There were difficult and close issues of credibility that had to be addressed by the jury. The government informers included murderers, perjurers, arsonists and drug addicts-all of whom received immunity from the government in exchange for their testimony. The key issue was credibility.

The evidence that was kept from the jury went directly to the credibility of two of the government informants and indirectly to the credibility of the entire case. The barred testimony directly contradicted two of the witnesses concerning two "acts of racketeering" charged against the petitioner in the indictment.

The Federal Rules of Evidence became effective January 2,1975. The rules were to be "construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined" (Rule 102).

The federal rules favor admission of evidence over exclusion if the evidence has *any probative value,* citations omitted, *United States v. King,* 713 F.2d 627, 631, (11th Cir. 1983).

Article 8 addressed the hearsay problem. Under Rule 804(b)(1) *former testimony* was "not excluded by the hearsay rule if the declarant was unavailable as a witness". Concerning the issue of 'identity of parties', in civil cases, the rule allows the substitution of one who had the right and opportunity to develop the testimony with similar motive and interest at the earlier proceeding. (See *The Notes of the Advisory Committee on Proposed Rules*).

The rule mandates that where the government seeks to introduce former testimony against a criminal defendant, that defendant must have been a party to the earlier proceeding. This exception was necessary to insure the constitutional rights of confrontation and cross-examination to criminal defendants.

> Under the sixth amendment, a criminal defendant has a constitutional right to *cross-examine* witnesses against him (*United States v. Fiore,* 443 F.2d 112, 115 and n.3 (2d Cir. 1971), to *confront* the witnesses against him (*Pointer v. Texas,* 308 U.S. 400, 403-406 (1965), and to *have compulsory process* to obtain witnesses in his favor.

However, regardless of what the rule states, where a criminal defendant seeks to introduce prior exculpatory testimony that is otherwise unavailable, due process and compulsory process mandate admission of such proof, whether or not the "same"

governmental agency was present at the prior proceeding. See *Chambers v. Mississippi,* 410 U.S. 284 (1973).

The exclusion of prior testimony, if not developed by the "same" party, was made part of the rule to protect the constitutional rights of criminal defendants. This shield was not meant to become a sword for a prosecutor to bar crucial defense evidence that was otherwise unavailable.

This potential constitutional problem with 804(b)(1) was recognized by legal scholars.

Weinstein's Evidence states that,

> "Where, however, it is the defendant in a criminal suit who wishes to use the prior testimony, due process may be required to be admitted against the United States even though a state may have been the prosecuting agency in the prior case." id at p.804-98

McCormick on Evidence, Third Edition, Section 256 states the following concerning offers by defendants in criminal cases;

> "However, in terms the rule as enacted insists on identity of prosecution also, which seemingly would bar a defendant in a federal prosecution from introducing exculpatory testimony from a related State case given by a since deceased witness . . . exclusion of such evidence implicates due process considerations, and quite likely was not intended by the Congress. See *Chambers v. Mississippi,* 410 U.S. 284 (1973).

The competing interests on this issue were never addressed by the trial court. The appellate court, if they considered the issue, failed to write on it:

> "Other subordinate claims of error include whether the court properly excluded prior sworn testimony of two appellants . . . We have carefully examined all claims of error

raised by all appellants and we find none has merit." id at 1489

This issue is important and should be addressed. With the tremendous growth of federal prosecutions, including the RICO statute; with the increase in multiple defendant trials; and the increase in joint state and federal cooperation, there will be more and more situations where Federal Rule 804 is relied upon by litigants. Multiple prosecutions insure situations where witnesses who have testified at prior proceedings will be unavailable for various reasons. The 'same party' limitation which was built into Rule 804 to protect the constitutional rights of criminal defendants cannot be twisted into a sword to bar the use of exculpatory testimony of unavailable witnesses by the same defendants-especially when the same testimony could be utilized by the government against the defendants. The conflict between 804 and sixth amendment must be addressed.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgement of the Court of Appeals for the Second Circuit of New York entered herein.

Respectfully submitted,

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DATED: May 13, 1986

APPENDIX

UNITED STATES of America, Appellee,

v.

Donald J. PAONE, Anthony M. Colombo, Joseph R. Rossi, a/k/a "The Hop", Thomas E. Marotta, Richard J. Marino, Rene Piccarreto, and Samuel J. Russotti, a/k/a "Red", Defendants-Appellants.

Nos. 84-1454, 84-1466, 84-1467, 84-1468, 84-1469, 84-1470 and 84-1471.

United States Court of Appeals,
Second Circuit.

Argued Dec. 16, 1985.

Decided Feb. 5, 1986.

Before TIMBERS, MESKILL and PRATT, Circuit Judges.

TIMBERS, Circuit Judge:

Appellants Donald J. Paone, Anthony M. Colombo, Joseph R. Rossi, Thomas E. Marotta, Richard J. Marino, Rene Piccarreto, and Samuel J. Russotti appeal from judgments of conviction entered December 17 and 21, 1984 in the Western District of New York, Thomas C. Platt, Jr., *District Judge,* sitting by designation.

Following a one and one-half month jury trial, appellants were found guilty of substantive violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and of conspiracy to violate RICO, 18 U.S.C. §§ 1962(c) and 1962(d) (1982). Three of appellants' co-defendants were acquitted by the jury. The district court sentenced each appellant to twenty years imprisonment on each of the two counts upon which they were convicted. Sentences were ordered to run consecutively for appellants Russotti, Piccarreto, Marino, Rossi, and Colombo. For

appellants Marotta and Paone, the sentences were ordered to run concurrently.

We find that the principal issues raised on appeal which warrant discussion in this opinion are (1) whether the admission of co-conspirators' statements at the trial violated the Federal Rules of Evidence or the confrontation clause of the Sixth Amendment; (2) whether appellant Marotta was denied his right to conflict-free counsel because his retained lawyer had represented a government witness seven years earlier; (3) whether the New York corroboration of accomplice testimony requirements is incorporated in a RICO prosecution; and (4) whether the testimony of a Rochester policeman, which the court eventually struck, was so prejudicial as to require a reversal. Other subordinate claims are raised.

Several appellants have adopted by reference points raised in the briefs of their co-appellants pursuant to F.R.A.P. 28(i).

For the reasons set forth below, we affirm the judgments of conviction of each appellant upon each count upon which he was convicted.

I.

We summarize only those facts believed necessary to an understanding of the principal issues raised on appeal.

Appellants' convictions arose from their participation in the conduct of a criminal enterprise in the Rochester, New York, area during an eleven year period. The indictment charged that between February 1971 and November 1982 appellants participated in a racketeering enterprise that extorted funds from gambling operations, and tried to prevent a rival group from encroaching on its control over gambling activities.

The predicate acts underlying the RICO charge encompassed a variety of serious offenses, including: the murder of Vincent Massaro; the murder of Thomas Didio; the attempted murders

of rival leaders; attempted arson, extortion, and obstruction of justice. Former members of the enterprise testified on behalf of the government regarding these offenses and about appellants' positions in the crime organization. Testimony disclosed that, before gambling joints could operate in the Rochester area, permission had to be obtained from the organization. The gambling clubs paid the organization between $400 and $1800 each week, even though the organization did not provide services to the clubs.

One of the predicate acts included in this RICO indictment was the 1973 murder of Vincent Massaro. In 1977 appellants Russotti, Piccarreto, Marino and Marotta were convicted of this offense in the New York Supreme Court for Monroe County. After they began serving their sentences, it was discovered that sheriff's deputies had committed perjury during the trial. On motion of the Monroe County District Attorney, the judgment was vacated, the indictment was dismissed, and these four appellants therefore were released. During their limited incarceration, disputes arose over the leadership of the organization. Some members were expelled from the organization. A rival group vied for control over the gambling operations. This "war between the factions" led to the murder of rival Thomas Didio, the attempted murder of Rosario Chirico, the attempted murder of Sonny Celestino, and the attempted arson of Chirico's place of business. The activities of this rival group are described in our opinion in *United States v. Barton,* 647 F.2d 224, 228-29 (2 Cir.), *cert. denied,* 454 U.S. 857 (1981).

There of course was a great deal of other evidence, some of which we shall refer to in our discussion of the principal claims of error which follows.

II.

The government presented its case primarily through the testimony of former members of the enterprise. Appellant Paone

claims that a number of co-conspirator statements concerning the activities of the enterprise were admitted in violation of the Federal Rules of Evidence and the confrontation clause of the Sixth Amendment. We disagree.

Under Fed.R.Evid. 801(d)(2)(E), a statement does not constitute hearsay if it is "offered against a party" and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Appellant asserts that the court allowed government witnesses to testify about statements which did not comply with the timing element that a statement can be made "during" the conspiracy and the motive element that a statement be "in furtherance" of the conspiracy.

[1] Appellant's claim that the court should not have admitted such statements under Rule 801(d)(2)(E) because they were not made "during" the conspiracy rests on the erroneous premise that the indictment related only to criminal conduct which occurred after 1978. The indictment, however, sets forth acts beginning as early as 1971. The RICO indictment centered on appellants' conduct in extorting funds from gambling houses in Rochester. The predicate acts can be traced readily to this criminal design. Vincent Massaro was killed because of his disobedience and his displeasure with his share of the proceeds from the racketeering activity. Also, the rift within the organization, which led to the murders and attempted murders of rival group leaders, erupted during the incarceration of the Massaro murder participants. The gambling houses provided the funds for the operation of the enterprise. Statements made before 1977 relating to the collection of these funds clearly were made during and in furtherance of the conspiracy. We cannot say that the conspiracy began as late as 1977. We therefore reject the claim that the 1973 Massaro murder and the gambling operations antedated the conspiracy. We also are not persuaded that the "in furtherance" requirement is a stringent as appellant urges.

Appellant points to portions of the testimony of government witness Thomas Pelusio as examples of narrative testimony that did not comply with the "in furtherance" requirement of Rule 801(d)(2)(E). Pelusio testified about a conversation concerning the Didio murder, a conversation in which he and some appellants participated. One appellant was reported as commenting on the manner in which Didio was killed, stating that it took only one bullet. Another appellant was reported as saying he wished that he had been present to watch Didio bleed. Other claims of error are based on the admission of testimony relating to 1975 and 1976 gambling operations and the 1973 Massaro murder.

[2] To begin with, in order to comply with the "in furtherance" requirement, there must be evidence that establishes the conspiracy and that the defendant participate in it. 4 Weinstein & Berger, Weinstein's Evidence § 801(d)(2)(E)[01], at 801-244 (1985); *United States v. Lieberman,* 637 F.2d 95, 102 (2 Cir.1980); *United States v. Lyles,* 593 F.2d 182, 194 (2 Cir.), *cert. denied,* 440 U.S. 972 (1979). We are satisfied that the participation of each appellant in the instant conspiracy was established. Once a conspiracy is shown to exist, the "evidence sufficient to link another defendant to it need not be overwhelming." *United States v. Provenzano,* 615 F.2d 37, 45 (2 Cir.), *cert. denied,* 446 U.S. 953 (1980) (quoting *United States v. Head,* 546 F.2d 6, 9-10 (2 Cir.1976), *cert. denied,* 430 U.S. 931 (1977)).

[3] Appellant also asserts that the narrative descriptions by the government witnesses did not satisfy the "in furtherance" requirement. In *United States v. Birnbaum,* 337 F.2d 490, 495 (2 Cir.1964), we recognized that mere idle chatter will not satisfy what is now Rule 801(d)(2)(E). Frequently, however, such statements may be admitted as declarations against penal interest, *Lieberman, supra,* 637 F.2d at 103, or under the state of mind exception to the hearsay rule. *United States v. Cicale,* 691 F.2d 95, 103-05 (2 Cir.1982), *cert. denied,* 460 U.S. 1082 (1983). We also have recognized that the "in furtherance" requirement of Rule

801(d)(2)(E) is satisfied when a co-conspirator is apprised of the progress of the conspiracy, or when the statements are designed to induce his assistance. *United States v. Perez,* 702 F.2d 33, 37 (2 Cir.), *cert. denied,* 462 U.S. 1108 (1983); *United States v. Mangan,* 575 F.2d 32, 44 (2 Cir.), *cert. denied,* 439 U.S. 931 (1978). In light of those principles, we are satisfied that there was no error here.

[4] Even if some of the informants' testimony did cross the line, appellant has not convinced us that the instant trial was tainted by any such testimony that might not have comported with Rule 801(d)(2)(E). This trial extended over a period of one and one-half months. In a trial of this length, we are mindful that the chance that a single error, assuming arguendo that such did occur, would be significant enough to cause reversal or mistrial is not as great as appellants would have us believe. "Experience teaches that while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial effect upon the ultimate result." *United States v. Jones,* 766 F.2d 994, 1004 (6 Cir. 1985) (quoting *In re Beverly Hills Fire Litigation,* 695 F.2d 207, 227 (6 Cir.1982), *cert. denied,* 461 U.S. 929 (1983)).

[5] In addition to his claim under Rule 801(d)(2)(E), appellant asserts that the admission of hearsay statements of co-conspirators violated his rights under the confrontation clause. The statements, according to appellant, did not contain sufficient indicia of reliability. Where co-conspirators' statements are so "crucial" to the prosecution and "devastating" to the defense, according to appellant, the confrontation clause is violated. We do not agree.

In *United States v. Puco,* 476 F.2d 1099, 1107 (2 Cir.), cert. denied, 414 U.S. 844 (1973), in commenting on a petition for rehearing, the Court made clear that, "[W]e did not and do not hold that a trial judge must find, before admitting a co-

conspirator's declaration, that it is not 'crucial' to the Government's case of 'devastating' to the defense." The court also stated:

> "For future applications of *Dutton* [*v. Evans,* 400 U.S. 74 (1970)] to similar situations, we suggest that when a co-conspirator's out-of-court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination. . . . In most cases the determination that a declaration is in furtherance of a conspiracy — a determination that the trial judge now must make in every case for admissibility — will decide whether sufficient indicia of reliability were present."

Id. at 1107 (footnote omitted). We also have recognized that "a higher standard of reliability is imposed if the hearsay statements are 'crucial' to the Government's case". *United States v. Stratton,* 779 F.2d 820, 830 (2 Cir.1985) (citing *Dutton v. Evans,* 400 U.S. 74 (1970)). As the *Puco* court indicated, however, the cases in which the requirements of the hearsay rule do not provide sufficient indicia of reliability to satisfy the confrontation clause will be rare. *Id.* at 1107-08. "This is true because a declaration in furtherance of a conspiracy would be against the penal interest of the declarant." *United States v. Perez,* 702 F.2d 33, 37 (2 Cir.), *cert. denied,* 462 U.S. 1108 (1983). *See also United States v. Wright,* 588 F.2d 31, 38 (2 Cir. 1978), *cert. denied,* 440 U.S. 917 (1979) (facts did not support departing from general rule that statements in furtherance of conspiracy contain sufficient indicia of reliability to satisfy confrontation clause).

In our view, the facts of the instant case do not warrant our departing from our earlier decisions. We decline appellant's invitation to require more support for a co-conspirator's statement than is required by Rule 801(d)(2)(E). We hold that the admission

of co-conspirator's statements did not violate the confrontation clause.

We acknowledge that the Supreme Court may address the issue of whether out-of-court statements must be addressed separately under the hearsay rules and the confrontation clause. The question appears to be presented in *United States v. Inadi,* 748 F.2d 812 (3 Cir.1985), No. 84-1580, *cert. granted,* 105 S.Ct. 2653 (May 25, 1985).

Appellant's third attack on the admission of co-conspirator declarations is his claim that the court made an inadequate *Geaney* finding. Under *United States v.* Geaney, 417 F.2d 1116 (2 Cir.1969), *cert. denied,* 397 U.S. 1028 (1970), where hearsay evidence in the form of a co-conspirator statement is admitted "subject to connection", the court must determine, when all the evidence has been received, whether the prosecution "has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence, independent of the hearsay utterances." 417 F.2d at 1120.

[6] Appellant asserts that the court was required to make a specific determination with respect to each defendant as to when he joined the conspiracy and the exact non-hearsay evidence that tied him to the conspiracy. There is not such requirement. In *United States v. Perez, supra,* 702 F.2d at 36, we held that "an implicit *Geaney* ruling can be inferred in the trial judge's decision to receive the evidence and to deny a directed verdict of acquittal on the conspiracy charge." Here, the court made a finding that each defendant was a member of the charged conspiracy. There was abundant evidence linking each defendant to the conspiracy. This is sufficient under both *Geaney* and *Perez.*

We hold that the court correctly admitted the co-conspirator's statements.

III.

[7] Several former members of the conspiracy testified on behalf of the government. Midway through the trial, government witness Monachino, a former member of the enterprise, disclosed on cross-examination that in 1975 attorney Richard Miller, who was representing appellant Marotta at the instant trial, had represented him, Monachino, in obtaining bail when Monachino was arrested on unrelated charges in 1975. Marotta thereupon requested that Miller be discharged as his attorney in the instant case. Marotta sought permission to retain new counsel. The court denied both requests after conducting an exhaustive colloquy with Monachino. Marotta claims that, since his retained attorney, seven years earlier, had represented a government witness who was testifying against Marotta in the instant case, his Sixth Amendment rights were violated. Marotta asserts that the disclosure that the same attorney at widely separated times had represented two men, each of whom was a member of the alleged conspiracy, so prejudiced the proceedings as to require a reversal and new trial. We disagree.

[8]While a defendant has a right to counsel of his choice under the Sixth Amendment, it is not an absolute right. *United States v. Ostrer,* 597 F.2d 337, 341 (2 Cir.1979). *See In Re Grand Jury Subpoena Served Upon John Doe, Esq. (SLOTNICK),* ____F.2d____, ____, (2 Cir.1986) (Jan. 9, 1986). Absent a conflict of interest, a defendant in a criminal case does not have the unfettered right to retain new counsel, particularly after trial has commenced. In determining whether to allow a defendant to retain new counsel, the court must consider whether a severance would then be required, the risks and problems associated with the delay, and whether substitutions would disrupt the proceedings and the administration of justice. *McKee v. Harris,* 649 F.2d 927, 931 (2 Cir.1981), *cert. denied,* 456 U.S. 917 (1982).

[9] We recognize that a defendant in a criminal case is entitled to conflict-free representation. *Cuyler v. Sullivan,* 446 U.S. 335,

349-50 (1980). For the reasons set forth below, however, we find that, if there was any conflict in the instant case, it was abated during the trial.

First, the government did not realize that attorney Miller previously had represented Monachino until the day before Monachino testified. Miller's representation of Monachino had been ten years earlier and was very limited. Miller had shared office space with Monachino's retained lawyer and merely had aided him in applying for bail. Monachino's need for legal representation at that time stemmed from criminal charges wholly unrelated to the instant case. Miller had not represented Monachino in any way since 1975. Second, Monachino waived any attorney-client privilege he had. As Marotta concedes, Miller subjected Monachino to a "disastrous" cross-examination. Third, following a detailed inquiry into the extent of the relationship between Monachino and Miller, the court carefully informed the jury of the limited nature of the prior representation. The court also explained to the jury that there was a limited universe of criminal defense lawyers in the geographic region and that such past representation was not unusual.

The situation here was not nearly as problematic as in the cases which appellant cites where we held that a defendant was denied his right to effective assistance of counsel. *E.g., United States v. Cancilla,* 725 F.2d 867, 870 (2 Cir.1984) (attorney who had engaged in similar criminal conduct lacked incentive to conduct a vigorous defense); *Solina v. United States,* 709 F.2d 160, 167-69 (2 Cir.1983) (defendant represented by unlicensed attorney).

Particularly in light of the trial court's careful instruction to the jury, Monachino's waiver of the attorney-client privilege, and the absence of any prejudice to Marotta, we hold that the court ruled correctly in refusing to allow Marotta to discharge his trial counsel and to retain new counsel midway through the trial that lasted one and one-half months.

IV.

[10] Six of the predicate acts underlying the RICO indictment were New York state law offenses of murder, attempted murder and attempted arson. Appellant Marino claims that, since New York state law requires corroboration of accomplice testimony to prove these offenses, such acts did not comply with the definition of "racketeering activity" under RICO. We disagree.

The RICO statute, 18 U.S.C. § 1961(1)(A) (1982), defines "racketeering activity" as "any act or threat involving murder, kidnaping, gambling, arson, robbery, extortion, or dealing in narcotic or other dangerous drugs, which is *chargeable under State law* and punishable by imprisonment for more than one year". (emphasis added). Appellant claims that, if an accused cannot be charged in the New York state courts for these offenses in the absence of accomplice testimony corroboration, he cannot be charged under the federal RICO statute. The court overruled appellant's claim in this respect at the close of the government's case and during the pre-charge conference.

We are satisfied that Congress did not intend to incorporate the various states' procedural and evidentiary rules into the RICO statute. The statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge. *United States v. Licavoli,* 725 F.2d 1040, 1047 (6 Cir.), *cert. denied,* 104 S.Ct. 3535 (1984). To adopt appellant's reading of "chargeable" would result in precisely the same criminal act, proscribed by the laws of two states, being the basis of a RICO violation in one state but not in the other — simply because of differences in what are essentially procedural rules. As in *United States v. Bagaric,* 706 F.2d 42, 62-63 (2 Cir.), *cert. denied,* 464 U.S. 840 (1983), we refuse to sanction such inconsistent results. Other courts' interpretations of § 1961(1)(A) support our interpretation of the statute. *See, e.g., United States v. Brown,* 555 F.2d 407, 418 n. 22 (5 Cir.1977), *cert. denied,* 435 U.S. 904 (1978) (rejecting Georgia's accomplice testimony cor-

roboration requirement in a RICO prosecution); *United States v. Licavoli, supra,* 725 F.2d at 1047, and cases cited therein (even though Ohio law precludes separate punishment for conspiracy to murder and murder, each can serve as separate predicate act in a RICO prosecution).

We hold that the district court correctly ruled that the New York corroboration of accomplice testimony requirement is not incorporated in a RICO prosecution.

V.

[11] Officer Pecora of the Rochester police department was called as a government witness at trial. Pecora's testimony included relating his June 18, 1978 conversation with appellant Marotta. Pecora had relayed to Marotta a description of the "mob war" in the Rochester area, based on descriptions which two informants had provided. Pecora testified that he asked Marotta to comment on the informants' stories. Pecora then repeated in court Marotta's reaction to the informants stories. Pecora's testimony also described appellants Russotti and Piccarreto as leaders of the organization. This hearsay testimony by Pecora on direct examination included the following:

> "Q. What else did you tell him?
>
> A. I also told Mr. Marotta that the first man stated that Sammy Gingello had declared himself over Samuel Russotti and Rene Piccarreto, and that there was no more equal power.
>
> I also told him that the man had stated to me that at approximately two weeks after the murder of Sammy Gingello that the A and the B team had a meeting, and it was suggested that this city be split into two parts with the river — or Main Street being the dividing line; that the A team found this acceptable, but the B team did not, and was primarily opposed to Sonny Celestino, and nothing was resolved at this meeting.

The bombings continued, and — both the A and B team became disorganized. He also stated that the A team was losing its hold by not being effective in taking care of the B team. Also stated to—

. . .

Q. What did you tell him the second man had stated to you?

A. The second man stated that in regards to the beating incident, that the whole problem would have ended with the beatings, but then the pipe bomb was found on Clifford Avenue and that started it all over again.

He stated that — the second man stated that the power structure of Samuel Gingello, Red Russotti and Rene Piccarreto was the same when they got out of jail as it was when they went to jail.

He also stated that the A team was suffering financially as a result of the bombings, and they were having difficulty — the A team was having difficulty — difficulty locating members of the B team.

He also stated that the problem would not be resolved unless at least these people are eliminated.

He also stated that members of the motorcycle club were probably the people that associated with Thomas Torpey.

After telling him these things, Mr. Marotta responded only by saying that he agreed with — with the beatings, what happened in the beatings, but he said there was — he was not sure that exactly happened because he was in jail at the time.

He did say that — those members, those men, were told that—

. . ."

The court first admitted the testimony tentatively, subject to later consideration. The court thereafter considered striking the testimony completely if Pecora did not disclose the identify of the informants. The court next decided to instruct the jury that the testimony was admissible against Marotta only. When Pecora

was recalled for cross-examination, the court finally instructed the jury to disregard completely the controversial testimony of Pecora. Pecora refused to disclose the identity of the informants and was held in contempt.

Pecora appealed to this Court from the order holding him in civil contempt. We vacated the contempt order, holding that Pecora was not required to disclose the identity of the informants since the court had struck Pecora's testimony. *United States v. Russotti,* 746 F.2d 945, 950 (2 Cir.1984). We observed that at that point in the trial the record did not establish such prejudice as to require a retrial because of the Pecora episode. *Id.* Our careful examination of the entire record, including events subsequent to Pecora's being held in contempt, satisfies us that nothing in the Pecora episode warrants disturbing the judgments of conviction.

Appellant Russotti, joined by several of the other appellants, argues that, even though the court struck the testimony eventually, its disclosure was so prejudicial as to require a reversal. Appellants assert that the jury was left with the impression that the informants existed, that what they said was true, and that the officer's reliance on the unnamed informants gave the government's witnesses who were former members of the enterprise increased credibility.

Appellants rely on *Bruton v. United States,* 391 U.S. 123 (1968), for the proposition that their inability to cross-examine the sources of Pecora's testimony violated the confrontation clause. In *Bruton,* the jury had been asked to apply a confession obtained after arrest to the hearsay declarant but not to his co-defendant. The issue before us is whether the court's instruction to the jury to disregard completely the testimony relating to the June 18 conversation was sufficient to obviate any prejudice to appellants.

Appellants Russotti and Piccarreto claim particular prejudice because they were identified as leaders in the organization. Other witnesses, however, testified as to the conduct and leadership po-

sitions of these same appellants in the organization. We are satisfied that the claimed prejudice was not as "devastating" as appellants assert. Moreover, unlike the situation in *Bruton,* the jury was not asked to apply the testimony to only some appellants, nor were these hearsay declarations made "post-arrest".

While we do not applaud the sequence of events here, we are mindful that occasions do arise, particularly during the course of a long trial, where, on balance, it is in the interest of the fair administration of criminal justice that a jury be given corrective instructions. We hold that this is such a case. *See United States v. Nixon,* 779 F.2d 126, 133 (2 Cir.1985). The jury was not asked to perform olympian mental gymnastics. Indeed, the court's expression of grave concern over this testimony during the trial may well have redounded to the benefit of appellants because the court emphasized to the jury the importance of disregarding the testimony entirely.

We hold that the court's corrective instruction to the jury, together with the factors referred to above, obviated any prejudicial impact of Pecora's testimony upon any of the appellants. We hold that the court did not err in any respect in its handling of the Pecora episode, including its refusal to grant appellants' motion for a mistrial.

[12] We believe it is appropriate and necessary to add a word of caution to the government. Preparation for and conduct during this long and somewhat complicated case no doubt were taxing on both the prosecution and defense counsel, as well as on the court. The government's proffer of Pecora's testimony, however, more resembled risk-creating improvisation than fine-tuned choreography. The government should have avoided this potential for prejudice by screening the testimony with appellants' counsel and the court before trial rather than plunging ahead with such hearsay testimony. After carefully reviewing the record, we believe that the government did not intentionally mishandle the proffer of Pecora's testimony. The scrutinizing trial judge abated

the potential prejudice. He displayed the patience of Job and the wisdom of Solomon throughout. We nevertheless reiterate the admonition to government counsel which Judge Newman stated in one aspect of this very case, *United States v. Russotti, supra,* 746 F.2d at 950, except that we underscore that admonition. United States attorneys are charged with knowledge of the decisions of this Court in criminal cases. Any disregard of our admonition in future cases will be dealt with accordingly.

VI.

Appellants have raised other subordinate claims of error which we do not believe merit discussion.

For example, appellants' claim that the inclusion of the 1973 Massaro murder as a predicate act violated the double jeopardy clause of the Fifth Amendment was rejected by us in an interlocutory appeal. *United States v. Russotti,* 717 F.2d 27 (2 Cir.1983), *cert. denied,* 465 U.S. 1022 (1984). We hold that there is no reason to disturb that decision.

Other subordinate claims of error include whether the predicate acts under RICO were charged and proven adequately; whether the court abused its discretion in denying mid-trial requests for delay; whether the court properly excluded prior sworn testimony of two appellants; whether the court properly refused to allow appellant Marotta's attorney to be called as a witness; whether the government used immunized testimony in its prosecution; and whether consecutive sentences could be imposed for conspiracy and substantive violations of RICO.

We have carefully examined all claims of error raised by all appellants and we find none has merit.

VII.

To summarize: We hold that the admission of the co-conspirators' statements violated neither the requirements of Fed.R. Evid. 801(d)(2)(E) nor the confrontation clause of the

Sixth Amendment; the limited representation of a government witness by appellant Marotta's retained counsel did not violate Marotta's right to conflict-free counsel; appellants' argument that the New York corroboration of accomplice testimony requirement is incorporated in the RICO definition of racketeering activity is without merit; the court's limiting instruction to the jury was sufficient to obviate any prejudice resulting from Officer Pecora's hearsay statements; and all of appellants' other claims of error, having been carefully considered, are without merit.

Appellants were convicted after a one and one-half month trial on the basis of overwhelming evidence of extraordinarily serious offenses committed over a period of time beginning fifteen years ago. We order that the mandate issue forthwith.

Affirmed.

WDNY
CR 82-156
PLATT

United States Court of Appeals

for the
SECOND CIRCUIT

FILED FEB 5. 1986, United States Court of Appeals, Second Circuit.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of February one thousand nine hundred and eight-six.

Present: HON. WILLIAM H. TIMBERS, HON. THOMAS J. MESKILL, HON. GEORGE C. PRATT, Circuit Judges,

UNITED STATES OF AMERICA, Appellee, -V- DONALD J. PAONE, ANTHONY M. COLOMBO, JOSEPH R. ROSSI, a/k/a "THE MOP", THOMAS E. MAROTTA, RICHARD J. MARINO, RENE PICCARRETO, and SAMUEL J. RUSSOTTI, a/k/a "RED", Defendants-Appellants.	Docket Nos. 84-1454 84-1466 84-1467 84-1468 84-1469 84-1470 84-1471

Appeals from the United States District Court for the Western District of New York.

These causes came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk
/s/ By: Edward J. Guardaro,
Deputy Clerk

A TRUE COPY
/s/ ELAINE B. GOLDSMITH
Clerk
(Seal)

FILED MAR 19, 1986, United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of March one thousand nine hundred and eighty-six.

UNITED STATES OF AMERICA, Appellee,	Docket No. 84-1470 84-1471
v.	84-1454 (L)
RENE PICCARETO and SAMUEL J. RUSSOTTI, Defendants-Appellants.	

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendants-appellants, Rene Piccareto and Samuel J. Russotti.

Upon consideration by the panel that heard the appeal, it is

Order that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Clerk

Nos. 85-1883, 85-1892, 85-1901, 85-1902 and 85-1949

In the Supreme Court of the United States

OCTOBER TERM, 1986

Court, U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

THOMAS E. MAROTTA, PETITIONER

v.

UNITED STATES OF AMERICA

DONALD J. PAONE, PETITIONER

v.

UNITED STATES OF AMERICA

SAMUEL RUSSOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

RENE PICCARRETO, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD J. MARINO and JOSEPH R. ROSSI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government is precluded under the Double Jeopardy Clause from including a predicate offense in a Racketeer Influenced and Corrupt Organizations Act (RICO) indictment where that offense purportedly could have been, but was not, included in a prior RICO indictment, charging a separate "pattern of racketeering," on which petitioners were acquitted.

2. Whether a New York rule requiring corroboration of accomplice testimony must be applied in a federal RICO prosecution.

3. Whether the admission of co-conspirator statements violated the Confrontation Clause on the ground that the court of appeals assertedly failed to require those statements to be independently analyzed for reliability.

4. Whether petitioner Marotta was denied his right to conflict-free counsel at trial because his attorney, some ten years earlier, had briefly represented a government witness on an unrelated matter, and whether the other petitioners were prejudiced by this purported conflict of interest.

5. Whether the district court properly refused to allow petitioner Marino to call Marotta's attorney as a witness during trial.

6. Whether the district court correctly refused to admit the prior testimony of two of the defendants where the federal government was not a party to, nor a participant in, the proceedings giving rise to the testimony.

7. Whether consecutive sentences may be imposed for conspiracy and substantive violations of the RICO statute.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1883

THOMAS E. MAROTTA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1892

DONALD J. PAONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1901

SAMUEL RUSSOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1902

RENE PICCARRETO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1949

RICHARD J. MARINO and JOSEPH R. ROSSI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 782 F.2d 386. The opinion of the court of appeals on a prior interlocutory appeal in the same case (85-1902 Pet. App. B1-B18) is reported at 717 F.2d 27.[1]

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1986. Petitions for rehearing were denied on March 19 and 24, 1986 (Pet. App. A20; 85-1892 Pet. App. A23-A24). The petition for a writ of certiorari in No. 85-1883 was filed on May 15, 1986; the petitions in Nos. 85-1892, 85-1901, and 85-1902 were filed on May 16, 1986; and the petition in No. 85-1949 was filed on May 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioners were convicted of racketeering and racketeering conspiracy, in violation of 18 U.S.C. 1962(c) and (d). Each petitioner was sentenced to 20 years' imprisonment on each of the two counts. Petitioners Russotti, Piccarreto, Marino, and Rossi received consecutive sentences on the two counts, while petitioners

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 85-1883. "Tr." refers to the trial transcript.

Marotta and Paone received concurrent sentences.[2] The court of appeals affirmed (Pet. App. A1-A17).

The evidence at trial, which was presented over eight weeks and consumed more than 8,000 pages of transcript, established that between 1971 and 1982 petitioners belonged to an organized crime group in the Rochester, New York, area that engaged in the extortion of gambling clubs. To maintain control over the gambling clubs—and to discipline dissident members, combat rival groups, and avoid prosecution—the members of the group engaged in murder, attempted murder, arson, and obstruction of justice. In particular, the indictment charged petitioners with committing, as acts of racketeering, two murders, three attempted murders, two acts of extortion, an attempted arson, and three obstructions of justice.

The evidence showed that in February 1971, Angelo Monachino and Vincent Massaro were inducted into a criminal organization known as the "mafia" or "La Cosa Nostra" in a ceremony at the home of Frank Valenti, the boss of the organization (Tr. 898-904, 913-915, 920). Thereafter, in 1972, Valenti was deposed and petitioner Russotti became the boss (Tr. 927-930). At the same time, Sam Gingello became the underboss, petitioner Piccarreto became the counselor, and petitioners Marino and Marotta became captains (Tr. 927). Under Russotti's direction, Marino was assigned to supervise Monachino, Massaro, Spike Lanovara, and Eugene DiFrancesco (Tr. 932). During the years following Russotti's accession to leadership, new recruits were admitted

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[2] Three co-defendants, Joseph J. Trieste, Joseph L. LaDolce, and John M. Trivigno, were acquitted at trial. Co-defendant Anthony M. Colombo was convicted at trial, but he has not petitioned for certiorari.

into the organization, including John Fiorino, Thomas Didio, and petitioners Paone and Rossi (Tr. 934-937).

In November of 1973, Eugene DiFrancesco advised Monachino that Piccarreto had ordered him to "hit" Vincent Massaro. Massaro, DiFrancesco reported, had disobeyed the leadership and complained about not being paid (Tr. 938-940, 947). DiFrancesco asked Monachino to help him carry out the "hit" (Tr. 940). When Monachino and DiFrancesco failed to execute Massaro promptly, Piccarreto met with Russotti, Marino, Gingello, and Monachino, and directed Monachino to take charge of the project personally (Tr. 948-952). Marino suggested that the murder be committed at Monachino's place of business (Tr. 953).

Following orders, Monachino, DiFrancesco, and Lanovara lured Massaro to Monachino's office; there, DiFrancesco shot Massaro in the back of the head and killed him (Tr. 964-965, 967-968). Monachino, DiFrancesco, and Lanovara then put Massaro's body in the trunk of his car, where it was later discovered (Tr. 975). Monachino and DiFrancesco thereafter told Marino that the job was done. Marino congratulated them (Tr. 981-982).[3]

In 1973, Thomas Pelusio obtained permission from petitioner Marotta to open an illegal gambling club in Rochester (Tr. 4159-4160, 4165). Although Marotta provided no services to the club, Pelusio paid Marotta a weekly fee for permission to operate (Tr. 4163-4164). During the following years, Pelusio, again after obtaining permission from Marotta or another organization member, opened several other

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[3] The murder of Vincent Massaro formed the basis for the first racketeering act, charging solicitation and conspiracy to murder Massaro.

gambling clubs in Rochester. In each instance, he made regular payments to Marotta, Didio, or Paone (Tr. 4169-4186). Pelusio understood that if he did not make his weekly payments to the members of the organization, his clubs would not be allowed to operate (Tr. 4182).

In 1976 and 1977, Gingello and petitioners Russotti, Piccarreto, Marino, and Marotta were tried and convicted in state court for the murder of Vincent Massaro (Tr. 6535, 6782). They were imprisoned in early 1977 (Tr. 4190, 6782). Because of his incarceration, Gingello chose Didio to assume his position in the organization (Tr. 4185-4186). During this period of imprisonment, however, because of dissatisfaction with the performance of Didio and his associates, a rift developed within the organization (Tr. 4191). Eventually, a faction led by Didio was expelled from the organization, and two rival factions vied for control of the gambling clubs (Tr. 2731-2734, 2738-2739).

In the fall of 1977, the defendants in the Massaro murder case were released from prison because it was discovered that local law enforcement officers had testified falsely at their trial (Tr. 2723, 2738, 2743-2746, 6535). Gingello's release, and his resumption of a leadership role in the organization, precipitated further violence between the two competing factions. In April 1978, a car bomb killed Gingello (Tr. 1687, 2755). The remaining members of Gingello's faction, which included the six petitioners and their associates Anthony Oliveri and John Fiorino, made plans to pursue those they deemed responsible for Gingello's murder, including Didio, Dominic Celestino, and Rosario Chirico (Tr. 2756-2758, 2767-2769, 2770, 2823-2824, 3553-3556, 4209-4211, 5882).

During May 1978, in furtherance of this revenge scheme, Rossi told Oliveri to follow Chirico in order to determine if there was any way to "get at him" (Tr. 2779). Oliveri thereafter recruited co-defendant Anthony Colombo to shoot Chirico in a wooded area between Chirico's home and his place of business (Tr. 2787-2795). Rossi provided Oliveri with a rifle and a motorcycle driver to assist in his escape (Tr. 2796-2798). On May 25, 1978, Colombo shot at Chirico but only wounded him (Tr. 2806, 6548). When Rossi learned that Chirico had been hit, he commented that "at least we got that much done" (Tr. 2806).[4]

Rossi next directed Oliveri to kill Celestino (Tr. 2813-2814). On June 18, Colombo, Rossi, and Oliveri lay in wait near Celestino's home (Tr. 2815-2816). Their murder attempt failed, however, because Celestino had been arrested earlier that day (Tr. 2816-2818).[5]

Following the attempt to shoot Celestino, Rossi told Oliveri to try to kill Didio, the leader of the rival faction. Fiorino and Paone were also assigned to find Didio (Tr. 2830-2832, 2836-2837). On July 5, 1978, Rossi, Colombo, and Oliveri drove to a motel in the Rochester area where Didio's girlfriend had been seen (Tr. 2852-2853). After the girlfriend departed, Colombo fired a machine gun into the room she had left, killing Didio (Tr. 2857-2863, 6429-6430).

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[4] The attempted murder of Rosario Chirico formed the basis for the second racketeering act, charging solicitation, conspiracy, and attempt to murder Chirico.

[5] The attempted murder of Dominic Celestino formed the basis for the third racketeering act, charging solicitation, conspiracy, and attempt to murder Celestino.

Oliveri, Colombo, and Rossi then sped from the scene. After the men abandoned their weapons and car, Marotta picked them up. Rossi reported, "I think we got him," and Marotta responded, "good" (Tr. 2864-2867).[6]

Following the murder of Didio, Rossi directed Oliveri to burn down the automotive body shop owned by Chirico in order to force him to leave town (Tr. 2883).[7] Oliveri and an associate unsuccessfully attempted to carry out this order, using gasoline and an incendiary device known as a "molotov cocktail" (Tr. 2884, 5598-5607, 5645).

At the same time that the revenge plots were being executed, Rossi and Oliveri assumed responsibility for collecting the ongoing payments from the gambling clubs (Tr. 2739, 2771-2776, 4200). Rossi would take the money to Russotti, Oliveri and Paone (Tr. 2776-2778). After Thomas Torpey, who owned one of the clubs, stopped making his weekly payments, he was visited by members of the organization, first by Piccarreto and Marino, and later by Russotti and Piccarretto. Russotti told Torpey, "You've got something going on in this town. I want a piece of it" (Tr. 4955). Finally, John Fiorino threatened to close the club because Torpey was not paying (Tr. 4976-4978). Fiorino threatened Torpey, "You know, you're no su-

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[6] On a later occasion, Paone said he was surprised that it only took one bullet to kill Didio. He added that he was also surprised that with all the bullets that were fired, only one had hit Didio (Tr. 4215). The murder of Thomas Didio formed the basis for the fourth racketeering act, charging solicitation, conspiracy, and the murder of Didio.

[7] Russotti had earlier tried to obtain some dynamite for the same purpose (Tr. 5884-5890).

perman. You can bleed and die like anybody else" (*ibid.*).[8]

In January 1979, Angelo DiMarco, an owner of one of the clubs making payments to Rossi, was subpoenaed to appear before a federal grand jury (Tr. 1688-1697, 1691-1693, 1726, 2775-2776). When he appeared, DiMarco described to the grand jury how he had given envelopes of cash to an employee every week for delivery to Rossi (Tr. 1728). Shortly thereafter, Rossi directed Anthony Oliveri to kill DiMarco, and he provided the weapons and a car for the murder (Tr. 2900, 2904, 2907). As Oliveri and Colombo waited near DiMarco's house, armed with a shotgun and pistol, a police car approached them and the two men were arrested (Tr. 2909, 2916).[9]

Vincent Rallo, an insurance broker, had arranged on Marino's behalf to register and insure in the names of fictitious persons the cars that were used in the murder of Thomas Didio and the attempted murder of Angelo DiMarco (Tr. 5892-5907, 5921-5934). After Oliveri and Colombo were arrested in one of those cars, Rallo told Marino that he was afraid the car would be traced to him (Tr. 5934). When Rallo was subsequently subpoenaed to appear before a federal grand jury, Marino told him to testify falsely by inventing descriptions of the fictitious persons in whose names the cars had been registered (Tr. 5936).

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[8] Extortions from two of the clubs formed the basis of the eighth and ninth racketeering acts, each charging the conspiracy, attempt, and actual commission of a federal extortion offense.

[9] The attempted murder of DiMarco and the related obstruction of justice formed the basis for the fifth and sixth racketeering acts, charging the state offenses of solicitation, conspiracy, and attempted murder of DiMarco, and the federal offense of obstruction of justice.

Early in 1981, Rallo decided to cooperate with the government. In that capacity, he tape-recorded three discussions he had with Marino regarding the progress of the government's investigation. In the course of those discussions, Marino gave Rallo instructions about how to testify before the grand jury (Tr. 5938). The recordings of those discussions were played for the jury at trial (Tr. 5955, 5974, 5977).[10]

ARGUMENT

1. Petitioners Piccarreto and Marino renew their contention (85-1902 Pet. 6-13; 85-1949 Pet. 18-25)—previously raised and rejected by the court of appeals in an interlocutory appeal (85-1902 Pet. App. B1-B18)—that the Double Jeopardy Clause precluded the government from including the 1973 Massaro homicide as a racketeering predicate in this indictment. The Massaro homicide should not have been included, they argue, because that crime could have been charged as a predicate act in a 1976 racketeering indictment on which petitioners were acquitted. In rejecting this argument once before, the court of appeals held that the two indictments charged two distinct patterns of racketeering: the earlier indictment had charged an arson-for-insurance scheme, while the present one charged a pattern of extortion. 85-1902 Pet. App. B10-B16. The Massaro murder, the court of appeals noted, was charged "as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its *extortion scheme*—a scheme which had no relationship to the 1976 arson-for-hire activity" (85-1902 Pet. App. B15-B16 (emphasis in original)). Be-

[10] The obstruction of justice with regard to Vincent Rallo formed the basis for the seventh racketeering act, charging the federal offense of obstruction of justice.

cause the two indictments could be separately prosecuted without offending the Double Jeopardy Clause, and because the Massaro murder was properly charged as part of the pattern of racketeering activity alleged in the second indictment, the government was not barred from including that offense as a predicate act in this case.

Following the court of appeals' earlier rejection of their double jeopardy claim, petitioners sought certiorari and made the same arguments they are making now. We argued in our brief in opposition to certiorari (Nos. 83-696 and 83-713) that the decision of the court of appeals was correct, and this Court denied review. In the present case, the court of appeals once again rejected petitioners' arguments (Pet. App. A16). Nothing has changed that would warrant further review of this issue at this time. We therefore rely on our previous submission in opposing this claim.[11]

2. Petitioners Marino and Rossi assert (85-1949 Pet. 3-8) that the definitional section of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961(1), incorporates state procedural provisions—in this case, the New York rule requiring that the testimony of accomplice witnesses be corroborated. Because the district court purportedly failed to require corroboration in this case, petitioners contend that the six predicate acts involving murder or attempted murder did not qualify as acts of "racketeering activity" within the meaning of Section 1961(1).[12] The court of appeals rejected that argu-

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[11] We are providing petitioners with copies of our brief in opposition in Nos. 83-696 and 83-713.

[12] It is well established that under federal law a conviction can properly rest on the uncorroborated testimony of an accomplice. See *Caminetti* v. *United States*, 242 U.S. 470, 495

ment, as has every other circuit that has considered it.

The courts of appeals have uniformly held that the reference in Section 1961(1) to crimes "chargeable under State law" is intended "simply to define the wrongful conduct, and not to incorporate state procedural law." *United States* v. *Licavoli*, 725 F.2d 1040, 1047 (6th Cir.), cert. denied, 467 U.S. 1252 (1984). The courts have consistently refused to incorporate state procedural rules such as the requirement that accomplice testimony be corroborated, see *United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); the law of merger, see *United States* v. *Licavoli*, 725 F.2d at 1046-1047; state speedy trial rules, see *United States* v. *Malatesta*, 583 F.2d 748, 758 (5th Cir. 1978), cert. denied, 440 U.S. 962 (1979); and state statutes of limitations, see *United States* v. *Brown*, 555 F.2d at 418 n.22.[13] See generally *United States* v. *Nardello*, 393 U.S. 286 (1969) (reference in Travel Act to state "extortion" statutes encompasses any conduct that would generally be classified as ex-

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(1917); *Krulewitch* v. *United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).

[13] The same principle applies to other federal statutes that incorporate state criminal charges for definitional purposes. See *United States* v. *Steele*, 685 F.2d 793, 807 (3d Cir.), cert. denied, 459 U.S. 908 (1982) (18 U.S.C. 1952); *United States* v. *Benmuhar*, 658 F.2d 14, 18 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982) (18 U.S.C. 1952); *United States* v. *Cerone*, 452 F.2d 274, 286-287 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972) (18 U.S.C. 1952); *United States* v. *Corallo*, 413 F.2d 1306, 1322-1323 (2d Cir.), cert. denied, 396 U.S. 958 (1969) (18 U.S.C. 1952); *United States* v. *Revel*, 493 F.2d 1, 2-3 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975) (18 U.S.C. 1955).

tortionate, regardless of the label given to the conduct by state law).[14]

3. Petitioners Paone, Marino, and Rossi challenge (85-1892 Pet. 9-18; 85-1949 Pet. 15-18) the admission of certain co-conspirator declarations. They argue that under the Confrontation Clause a trial court may not admit co-conspirator declarations unless it first finds that they contain special "indicia of reliability." The short answer to this claim is that the court of appeals employed precisely the analysis urged by petitioners; the court simply reached a result with which petitioners disagree. Because petitioners have already had the benefit of the constitutional rule they propose, their claim reduces to the fact-bound contention that the court of appeals misapplied that rule in this case.

a. In rejecting petitioners' claim, the court of appeals based its analysis on the court's earlier decision

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[14] Petitioners' argument, taken to its logical limits, would significantly impair the effectiveness of the RICO statute. For example, New York grand jury law—in addition to the rule requiring corroboration of accomplices—prohibits the use of hearsay, see N.Y. Crim. Proc. Law § 190.30 (McKinney 1982), and the government's impeachment of witnesses it has called before the grand jury, see *People* v. *Fiore*, 112 Misc. 2d 45, 48, 445 N.Y.S.2d 960, 961-962 (Nassau County Ct. 1981). Every grand jury witness, moreover, is automatically entitled to immunity, see N.Y. Crim. Proc. Law § 190.40 (McKinney 1982), and the government may seek an indictment only where there is sufficient evidence to convict at trial, see *People* v. *Monroe*, 125 Misc. 2d 550, 480 N.Y.S.2d 259 (Sup. Ct. 1984). If, as petitioners suggest, the RICO statute adopts state procedural rules, the effectiveness and uniform application of the statute would be substantially undermined because of the wide assortment of applicable state procedural rules that would govern the conduct of federal grand jury and trial proceedings.

in *United States* v. *Puco*, 476 F.2d 1099, 1107 (2d Cir.), cert. denied, 414 U.S. 844 (1973). As in *Puco*, the court of appeals in this case held that when a co-conspirator's out-of-court statement is offered into evidence, the trial judge must determine whether the statement bears " 'sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination' " (Pet. App. A7 (quoting *Puco*, 476 F.2d at 1107)). The court further noted that it had previously recognized that " 'a higher standard of reliability is imposed if the hearsay statements are "crucial" to the Government's case.' " *Ibid.* (quoting *United States* v. *Stratton*, 779 F.2d 820, 830 (2d Cir. 1985)). Nonetheless, the court observed, only rarely will a statement otherwise admissible under the hearsay rules fail to contain the indicia of reliability required by the Confrontation Clause. Because of the nature of the statements at issue in this case, the court held, no detailed reliability analysis was required (Pet. App. A7).

Contrary to petitioners' assertion, this Court's decision in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), does not require a different result. In *Roberts*, this Court rejected a Confrontation Clause challenge to the admission at trial of testimony that had been given at a preliminary hearing. The Court stated (448 U.S. at 65-66) that the Confrontation Clause requires that out-of-court statements offered at trial must ordinarily be shown to be reliable. Significantly, however, the Court added that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 66. Because the rule governing co-conspirator statements is just such a firmly rooted hearsay exception, we submit that *Roberts* supports the view that the Con-

frontation Clause does not require a separate inquiry into the reliability of statements that are found to satisfy the traditional co-conspirator declaration rule, see Fed. R. Evid. 801(d)(2)(E).[15]

To be sure, there is a conflict among the circuits on the question whether the Confrontation Clause requires a further "reliability review" beyond the reliability judgment assured by the requirements of Rule 801(d)(2)(E). Several circuits do not require a further examination of a statement's reliability, once that statement has been found to satisfy the co-conspirator declaration rule. See *United States* v. *Chindawongse*, 771 F.2d 840, 845-847 (4th Cir. 1985), cert. denied, No. 85-735 (Jan. 21, 1986); *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). Other courts, including the Second Circuit, require a separate reliability analysis under the Confrontation

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[15] Much of what this Court said about co-conspirator declarations in *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), underscores this point. There, the Court refused to apply to co-conspirator statements a rule, applicable to prior testimony, requiring a preliminary determination of the declarant's unavailability. While expressly declining to decide whether trial courts must subject such statements to an independent reliability test (slip op. 4 n.3), the Court took special account of the "evidentiary significance of statements made when the conspiracy was operating in full force" (*id.* at 8). In light of these special features, the Court chose "to affirm the validity of the use of co-conspirator statements" and "decline[d] to require a showing of the declarant's unavailability as a prerequisite to their admission" (*id.* at 12-13).

Clause, even after the statements have passed muster under the rules of evidence. See, *e.g.*, *United States* v. *DeLuna*, 763 F.2d 897, 909-911 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Arbalaez*, 719 F.2d 1453, 1459-1460 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); *United States* v. *Ammar*, 714 F.2d 238, 256-257 (3d Cir.), cert. denied, 464 U.S. 936 (1983). As a practical matter, however, this difference in approach has proved to be of little significance: there apparently has never been a case in which a court of appeals has excluded a co-conspirator's statement under the Confrontation Clause after finding that the statement satisfied Rule 801(d)(2)(E). For that reason, the conflict among the circuits on this issue is not one that warrants this Court's attention. In any event, the Second Circuit is one of the courts that requires an independent reliability review under the Confrontation Clause. Petitioners had the benefit of the more generous standard in this case, so review by this Court is particularly inappropriate here.

b. Under the reliability analysis urged by petitioners—and applied by the court of appeals in this case—it is clear that the co-conspirator statements in this case were correctly admitted at trial. First, almost all the statements related to contemporaneous events. There was therefore no risk of inaccuracy stemming from faulty recollection on the part of the declarants. See *United States* v. *McGrath*, 613 F.2d 361, 368 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980); *United States* v. *Wright*, 588 F.2d 31, 37-39 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979).

Second, the statements were virtually all against the penal interest of the declarants. Again, this factor decreased the likelihood that the statements would be false or mistaken. See *United States* v. *Pagan*,

721 F.2d 24, 31 (2d Cir. 1983); *United States* v. *Perez*, 702 F.2d 33, 37 (2d Cir.), cert. denied, 462 U.S. 1108 (1983); *United States* v. *Perez*, 658 F.2d 654, 662 (9th Cir. 1981).

Third, contrary to Paone's assertion (85-1892 Pet. 14), the declarants in this case had no apparent motive to dissemble; most of the statements were made among the co-conspirators at a time when they knew each other to be members of the conspiracy. See *United States* v. *Mallah*, 503 F.2d 971, 980 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975). Moreover, most of the statements were made while the declarants were reacting to, planning, or carrying out significant events in the operation of the enterprise. It was therefore most unlikely that the co-conspirators would have intentionally misreported those important events to their associates. See *United States* v. *DeLuna*, 763 F.2d at 910 & n.3; *United States* v. *Southland Corp.*, 760 F.2d 1366, 1377 (2d Cir.), cert. denied, No. 84-1951 (Oct. 7, 1985); *United States* v. *Ammar*, 714 F.2d 256-257 & n.16; *United States* v. *Wright*, 588 F.2d at 37-38.[16]

Finally, the co-conspirators' declarations in this case were well corroborated by the testimony of the principal government witnesses and by other evidence.

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[16] In attacking the reliability of the co-conspirator declarations, Paone (85-1892 Pet. 4-8, 17-18) has erroneously focused on the motivations of the witnesses at trial to lie in recounting those declarations. The probity or lack of probity of the witnesses who reported the declarations, however, has little to do with the admissibility of the declarations themselves under the Confrontation Clause, since the trial witnesses were available to be cross-examined on the accuracy of their reports. It is the *declarants'* motivations that are important; and in this case there is no basis to believe that the declarants had any motivation to dissemble at the time they made the statements.

See *United States* v. *DeLuna*, 763 F.2d at 910-911; *United States* v. *Ammar*, 714 F.2d at 256-257; *United States* v. *Wright*, 588 F.2d at 38. The bulk of the government's case was based on the first-hand observations of witnesses Oliveri, Monachino, Pelusio, Rallo, and gambling club operator Thomas DiGiulio. Their testimony was extensively corroborated with respect to particular events by physical evidence and by police surveillance evidence.[17] In sum, because the court of appeals applied the same reliability test that is urged by petitioners, and because, after applying that test to the lengthy and complex factual record in this case, the court of appeals found the statements to be admissible, this issue does not warrant further review.

4. Petitioner Marotta contends (85-1883 Pet. 16-18) that he was denied his right to conflict-free counsel when the district court refused to grant him a severance or a continuance so that he could discharge

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[17] To the extent that Confrontation Clause analysis must also include consideration whether the statements are "crucial" to the prosecution or "devastating" to the defense (see *Dutton* v. *Evans*, 400 U.S. 74 (1970)), as petitioners also suggest (85-1892 Pet. 18-21; 85-1949 Pet. 17-18), the statements in this case were neither. The co-conspirator declarations did fill in certain details about which the government witnesses did not have first-hand knowledge. But because of the substantial additional evidence inculpating the defendants, and the extensive corroboration of the testimony of the principal witnesses, the co-conspirator declarations played a relatively limited independent role in inculpating the defendants. See *United States* v. *Perez*, 658 F.2d at 662. The court of appeals was therefore correct in concluding that this was not a case calling for the application of the Second Circuit rule that imposes a higher standard of reliability when the hearsay statements are "crucial" to the government's case (Pet. App. A7, quoting *United States* v. *Stratton*, 779 F.2d 820, 830 (2d Cir. 1985)).

his attorney and substitute new counsel during the trial. Building on this claim, petitioners Marino and Rossi assert (85-1949 Pet. 11-13) that the other defendants were prejudiced by the continued involvement of Marotta's lawyer in the case. These arguments are meritless.

a. During his cross-examination, government witness Angelo Monachino disclosed that when he was arrested in 1975 on unrelated charges, attorney Richard Miller, who represented Marotta in this trial, had sought to obtain bail for him. At a bench conference, Miller explained that he had shared an office with Monachino's lawyer at that time, and that on several occasions between February and June 1975 he had assisted Monachino's lawyer in representing Monachino on the pending charges, all of which were unrelated to the charges involved in this case. Miller added that he had not represented Monachino on any matter since 1975 (Tr. 1000-1002).

At that point, Marotta requested that Miller be discharged as his attorney, and he asked for permission to retain new counsel (Tr. 1018). The court then held a lengthy colloquy with Monachino, in which Monachino agreed to waive his attorney-client privilege with regard to any disclosures he may have made to Miller in the course of that representation (Tr. 1038-1052; see also Tr. 1112-1113). Following that colloquy, the district court declined to grant Miller leave to withdraw from the case.

The court of appeals correctly held that the district court's action did not abridge Marotta's Sixth Amendment rights. First, the court noted that a criminal defendant does not have an unfettered right to substitute new counsel, particularly after trial has commenced, when such a step will require a severance, a

delay in the trial, or some other disruption in the proceeding. See *United States ex rel. Spurlark* v. *Wolff*, 683 F.2d 216, 219-220 (7th Cir. 1982); *McKee* v. *Harris*, 649 F.2d 927, 931 (2d Cir. 1981), cert. denied, 456 U.S. 917 (1982); *United States* v. *Calabro*, 467 F.2d 973, 986 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973). Certain restraints must be placed on the reassignment of counsel lest the right be " 'manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.' " *McKee* v. *Harris*, 649 F.2d at 931 (quoting *United States* v. *Bentvena*, 319 F.2d 916, 936 (2d Cir.), cert. denied, 375 U.S. 940 (1963)). In this case, to have permitted Marotta to change counsel would have required either a lengthy postponement in the trial or, more likely, a severance and a separate trial for Marotta alone. In these circumstances, it was perfectly proper for the court to deny the request for substitution of counsel.

Moreover, as the court of appeals correctly held, Miller's purported conflict of interest was highly attenuated. Miller's representation of Monachino had occurred ten years earlier, it was extremely limited in nature, and it was unrelated to any of the present charges. In addition, Monachino expressly waived any attorney-client privilege he had, which authorized Miller to use, on Marotta's behalf, any information he may have secured during the prior representation. Under these circumstances, Marotta could not have been prejudiced by Miller's prior representation of Monachino. See *United States* v. *Agosto*, 675 F.2d 965, 972 (8th Cir.), cert. denied, 459 U.S. 834 (1982); *United States* v. *Shepard*, 675 F.2d 977, 980 (8th Cir. 1982); *Theodore* v. *New Hampshire*, 614 F.2d 817 (1st Cir. 1980); *United States* v. *Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979), cert. denied,

446 U.S. 964 (1980); *United States* v. *Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); see generally *United States* v. *Cunningham*, 672 F.2d 1064, 1072 (2d Cir. 1982) ("we are aware of [no case] in which an attorney has been disqualified on grounds of conflicting prior representation solely at the behest of a person other than the former client or its privy"), cert. denied, 466 U.S. 951 (1984). Finally, the district court carefully informed the jury of the insubstantial nature of the prior representation and advised the jurors that they were to draw no adverse inferences from that representation (Pet. App. A10; Tr. 1114-1116). The court of appeals correctly concluded that in view of the detailed instruction to the jury, Monachino's waiver of the attorney-client privilege, and the absence of any showing of prejudice to Marotta,[18] no substitution of counsel was necessary.[19]

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[18] Marotta complains (85-1883 Pet. 12-15) that as a result of his inability to obtain substitute counsel, he was unfairly bound by the stipulations entered into by other counsel, to which he did not agree. That is incorrect. In fact, Marotta signed certain of the stipulations and declined to sign others. The court repeatedly acknowledged that Marotta would not be bound by the stipulations that he did not sign, and it so instructed the jury (Tr. 5332, 5596, 6509-6512, 6530-6535).

[19] Petitioner's claim (85-1883 Pet. 16) of a conflict among the circuits on this issue is insubstantial. Petitioner relies on *Walberg* v. *Israel*, 766 F.2d 1071 (7th Cir. 1985), cert. denied, No. 85-331 (Dec. 12, 1985) and *Wilson* v. *Mintzes*, 733 F.2d 424 (6th Cir.), vacated, 469 U.S. 926 (1984), on remand, 761 F.2d 275 (6th Cir. 1985), in which the courts ruled that substitution of counsel should have been allowed. Those cases, however, are readily distinguishable. In *Walberg* the court of appeals granted relief because it concluded that the trial court's hostility to defense counsel had denied the defendant a fair trial. In *Wilson*, the court of appeals likewise concluded that the trial judge's antagonism toward defense

b. Petitioners Marino and Rossi argue (85-1949 Pet. 11-13) that the remaining defendants were prejudiced by Miller's continued representation of Marotta at trial. They reason that Miller's previous representation of Monachino, coupled with his ongoing representation of Marotta, bolstered in the minds of the jurors the government's theory "that an organization/enterprise existed * * * and that one of its objectives was to subvert law enforcement efforts by supplying legal assistance to its alleged members" (85-1949 Pet. 12). This is a most speculative inference to draw; certainly nothing in the one line of testimony about Miller's prior representation of Monachino suggested that Miller had been hired to represent Monachino by the "enterprise"—much less that Miller was subsequently reassigned to Marotta in some sort of "mob legal services" arrangement (*ibid.*). Indeed, in the setting in which the Miller episode arose, it is particularly unlikely that the jury drew any parallel between that episode and the two instances in which members of the enterprise had obtained legal assistance for others. The testimony about those two instances came much later in the trial and involved defendants other than Marotta. Moreover, the court's curative instruction put to rest any possible adverse inference the jury might have drawn from the Miller episode; the court carefully explained to the jury that Miller was simply accommodating an attorney with whom he shared office space when he represented Monachino, that he performed a relatively minor service, and that such an accommodation is not at all uncommon among criminal defense lawyers (Tr. 1114-1115).

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counsel, which included suggestions that counsel was incompetent, resulted in real prejudice to the presentation of a defense.

5. Petitioner Marino claims (85-1949 Pet. 14-15) that he was denied a fair trial when the court did not permit him to call Marotta's lawyer as a defense witness. The court of appeals correctly found that this argument was without merit (Pet. App. A16).

One morning late in the trial, counsel for Marino announced to the court that he had just learned from Marotta's attorney, Richard Miller, that Miller had been present at a gathering at Marino's home on the day of Gingello's funeral (Tr. 4052). Marino's counsel said that Miller would testify that the event was a quiet and entirely innocuous after-funeral affair, and not a meeting to plan revenge against the rival faction for the murder of Gingello. The trial court noted that if counsel wished to establish that point, Miller was not an essential witness, because there were many other persons present at that gathering who could testify on the point (Tr. 4053).[20] After a formal proffer was made at the close of the defense case, the district court ruled that because Miller was an attorney for a party in the case, it would be improper for him to appear as a defense witness (Tr. 6876).

It is well settled that a district court should not permit an attorney for a party to testify as a witness absent compelling reasons or extraordinary circumstances. See *United States* v. *Dack*, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984); *United States* v. *Johnston*,

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[20] Contrary to petitioner's contention, there was no suggestion by the government at trial that the post-funeral gathering at Marino's house was anything but an innocuous post-funeral affair, as Miller would have testified. The government's evidence was that the critical meeting among the co-conspirators, at which they planned the campaign of revenge against Didio's faction, occurred at Rossi's apartment several days later (see Tr. 2766-2770, 3488, 3519-3523, 3552-3553).

690 F.2d 638, 644 (7th Cir. 1982); *United States* v. *Bates*, 600 F.2d 505, 510-511 (5th Cir. 1979); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977); *United States* v. *Torres*, 503 F.2d 1120, 1126 (2d Cir. 1974). Only if the proposed testimony is important, and there is no other way to present that evidence, is it appropriate to permit a participating lawyer to testify. *United States* v. *Bates*, *supra*; *United States* v. *Nyman*, 649 F.2d 208, 211 (4th Cir. 1980). Here, the court of appeals, with the entire record before it, concluded that the minimal value of Miller's prospective testimony did not warrant departing from the traditional proscription against testimony by a party's attorney. That decision was plainly correct: the post-funeral gathering at Marino's home was apparently a well-attended affair, and there were presumably other persons who could have testified about the nature of the affair, to the extent that that evidence was relevant at all.

6. Petitioners Russotti, Piccarreto, Marino, and Rossi contend (85-1901 Pet. 6-9; 85-1902 Pet. 16-19; 85-1949 Pet. 8-10) that the district court erred when it failed to admit the recorded testimony of two of the defendants from prior state proceedings. The defendants had offered testimony given by Colombo before a state grand jury and testimony given by Piccarreto in a state criminal trial. They argued that, although the prior testimony was hearsay as to the two declarants, it was admissible on behalf of the other defendants, under Fed. R. Evid. 804(b)(1), as the former testimony of an unavailable declarant. The district court refused to admit the prior testimony because the United States had not been a party to the state proceedings, and thus, as "the party against whom the testimony is now offered," the

United States did not have "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). See *United States* v. *Kapnison*, 743 F.2d 1450, 1458-1459 (10th Cir. 1984), cert. denied, No. 84-971 (Apr. 15, 1985); *United States* v. *Lanci*, 669 F.2d 391, 394 (6th Cir.), cert. denied, 457 U.S. 1134 (1982); *United States* v. *Atkins*, 618 F.2d 366, 372-373 (5th Cir. 1980); see also D. Louisell & C. Mueller, *Federal Evidence* § 487, at 1102 n.3 (1980).

Recognizing that Rule 804(b)(1) does not allow the admission of this proffered evidence, petitioners maintain that the rule is unconstitutional as applied. In making this argument, petitioners rely principally on this Court's decision in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). *Chambers*, however, is readily distinguishable from this case. In *Chambers*, the defendant was prevented by state hearsay rules from introducing several statements made by a person who confessed to the very crime for which the defendant was on trial. The statements were thus directly exculpatory of the defendant, amounting to evidence "critical to Chambers' defense" (410 U.S. at 302). Moreover, the statements had considerable assurances of reliability: they were corroborated by other evidence; they were quite clearly against the penal interest of the declarant; and the declarant was in fact available for cross-examination (410 U.S. at 300-301).

Here, by contrast, the proffered testimony consisted of little more than bare self-serving denials of culpability by Piccarreto and Colombo (see Piccarreto App. 507-528, 6263-6264).[21] Piccarreto simply denied having been personally involved in the Massaro mur-

[21] "Piccarreto App." refers to the appendix to Piccarreto's brief in the court of appeals.

der plot; his testimony did nothing to exculpate the other defendants. Similarly, in his state grand jury testimony, Colombo simply denied that he and Oliveri had attempted to murder DiMarco. Thus, Colombo's testimony exculpated Colombo—who clearly was precluded from offering his own prior testimony—but it did nothing to exculpate the remaining defendants. Finally, in the prior state proceedings, both defendants were testifying under circumstances giving them a powerful motivation to lie.

Thus, the proffered testimony in this case was not critical to the defense, nor did it possess any of the assurances of reliability that characterized the evidence in *Chambers*. This would therefore be a highly unsuitable case in which to consider, as petitioners urge, whether to fashion a novel constitutional exception to Rule 804(b)(1).

7. Finally, petitioners Marino and Rossi contend (85-1949 Pet. 25-27) that the court of appeals erred in permitting consecutive sentences for their convictions under the RICO substantive and conspiracy provisions, 18 U.S.C. 1962(c) and (d). That contention flies in the face of this Court's analysis of closely analogous statutory schemes as well as the rule adopted in the great majority of circuits.

This Court has long held that it is permissible to impose consecutive sentences for ordinary substantive offenses and conspiracies to commit those offenses. See *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger* v. *United States*, 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit cumulative punishment. In *Albernaz* v. *United States*, 450 U.S. 333

(1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States* v. *Rodriguez*, 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).

Applying the same analysis, the courts of appeals that have considered the issue have noted that RICO substantive and conspiracy provisions require proof of separate elements; they have therefore almost uniformly concluded that the two provisions permit consecutive punishments. *United States* v. *Watchmaker*, 761 F.2d 1459, 1477 (11th Cir. 1985); *United States* v. *Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), cert. denied, 464 U.S. 840 (1983); *United States* v. *Marrone*, 746 F.2d 957, 959 (3d Cir. 1984); *United States* v. *Cagnina*, 697 F.2d 915, 923 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Rone*, 598 F.2d 564, 570-571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). The only exception is the Sixth Circuit's decision in *United States* v. *Sutton*, 642 F.2d 1001, 1040 (en banc), cert. denied, 453 U.S. 912 (1981). In *Sutton*, the court held that because the same evidence at trial supported both the

RICO substantive and conspiracy convictions, the convictions merged for purposes of sentencing. As later cases have pointed out, however, the *Sutton* court overlooked the fact that the *Blockburger* test focuses not on the evidence adduced at trial, but on the elements of the crimes charged. *United States* v. *Davis*, No. 85-2473 (10th Cir. June 9, 1986), slip op. 6-8; *United States* v. *Watchmaker*, 761 F.2d at 1477; *United States* v. *Marrone*, 746 F.2d at 959. As long as the elements of the two crimes are different, there is no constitutional impediment to imposing cumulative punishments for conduct that violates both statutory provisions—even if the same proof at trial supported both convictions.

Although there is a conflict among the circuits on this issue, it is not one that requires resolution by this Court. The *Sutton* case was decided before this Court's decision in *Albernaz* and before most of the circuit court decisions that have rejected *Sutton*'s analysis of the consecutive sentencing issue. In light of these subsequent developments we believe that when the Sixth Circuit once again squarely confronts the issue, it is highly likely that that court will conclude that consecutive sentences are permissible under 18 U.S.C. 1962(c) and (d).[22]

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[22] In *United States* v. *Qaoud*, 777 F.2d 1105, 1118 (1985), the Sixth Circuit referred to its previous decision in *Sutton*, but it did not have occasion to revisit the merits of the consecutive sentencing issue.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

1986 TERM

SAMUEL J. RUSSOTTI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER, SAMUEL J. RUSSOTTI

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In argument number six (page 23 of Respondent's Brief in Opposition) the government addresses the petitioner Russotti's argument that Federal Rule 804 (b)(1) on its face, and as interpreted by the Court in this case, violated the petitioner's constitutional rights to compulsory process and due process of law where its application prevented the introduction of exculpatory prior sworn testimony of two key witnesses unavailable to the defense at the time of the trial.

The respondent states that the "proffered testimony was not critical to the defense." It *was* critical to the defense. The petitioner was not charged in the state court with the crime of murder. That had already occurred in a state court conviction, which had been procured through the perjured testimony of several police officers, was dismissed with prejudice on the motion of the Monroe County District Attorney's Office when the perjury was discovered.

This petitioner, rather, is charged under RICO with being part of an enterprise that engaged in criminal activities, one of which was the murder of Massaro. The theory was that the "bosses" ordered other people to do the killings. The testimony by one of the alleged "bosses", namely Piccarreto, that the meeting wherein the order was supposed to have been given did not occur, was critical to the defense and highly relevant to the jury. It directly contradicted the only witness who claimed that this meeting wherein orders were given ever occurred.

The respondent states that the proffered testimony "did not possess any of the assurances of reliability that characterized the evidence in Chambers". That is simply inaccurate. The proffered testimony of Piccarreto was given under oath before a jury of his peers in a courtroom wherein the state prosecutor engaged in extensive cross-examination. These assurances of reliability have

been recognized by our system for hundreds of years as being one of the most significant assurances or reliability.

The prosecution states the testimony of Columbo and Piccarreto was "little more than bare, self-serving denials of culpability". Any time a defendant takes the stand in his own behalf it is obviously "self-serving". The motivation of the witness to testify is precisely what a jury is present in the courtroom to evaluate. That is a jury issue, not a means by which a prosecutor can keep relevant testimony from a jury.

The respondent states that the defendant Columbo's sworn grand jury testimony before the Monroe County Grand Jury "did nothing to exculpate" anyone but himself. Once again the whole nature of the RICO statute is ignored. The petitioner and the other co-defendants were charged with either giving the orders of executing the orders issued by the organization which led to the alleged incident that Columbo denies ever occurred. If it exculpates Columbo, it exculpates all of the alleged members of the enterprise and it is for the jury to decide.

It should be noted that at trial the government's only argument against the admission of the testimony was that the "same party," namely the federal authorities, did not conduct the cross-examination of either Piccarreto or Columbo. Rule 804(b)(1) is unconstitutional in that it allows the government in the case to use prior testimony of a non-testifying co-defendant against another at trial if it helps their case. According to the Rule, a defendant can not use that same testimony if its helpful or exculpatory to him and the the co-defendant is still unavailable. The respondent's arguments all go to jury questions of credibility and not to admissibility. The evidence was crucial to the case, it was exculpatory to the offering defendants, it had substantial assurance of reliability, and its unavailability was created by the prosecution because of its decision to jointly indict ten people.

That portion of Rule 804 which prevents the introduction of such testimony is unconstitutional. This question should be reviewed by this Court because of the obvious import of the issue. The government relied on a high percentage of hearsay to prove its case against the petitioner. This testimony was so critical to the petitioner's defense and is therefore an appropriate case for this Court to consider, regarding the application of the statute.

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Nos. 85-1892, 85-1901, 85-1902 and 85-1949

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD J. PAONE, PETITIONER

v.

UNITED STATES OF AMERICA

SAMUEL RUSSOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

RENE PICCARRETO, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD J. MARINO AND JOSEPH R. ROSSI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1892

DONALD J. PAONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1901

SAMUEL RUSSOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1902

RENE PICCARRETO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1949

RICHARD J. MARINO AND JOSEPH R. ROSSI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN OPPOSITION

The seventh question presented in this case is whether consecutive sentences may be imposed for convictions under the Racketeer Influenced and Corrupt Organizations Act (RICO) substantive and conspiracy provisions, 18 U.S.C. 1962(c) and (d). Petitioners Marino and Rossi (85-1949 Pet. 25-27) ask the Court to review that question,

relying on a conflict between the Sixth Circuit's decision in *United States* v. *Sutton*, 642 F.2d 1001 (1980) (en banc), cert. denied, 453 U.S. 912 (1981)—holding that consecutive sentences may not be imposed—and the uniformly contrary decisions of the other courts of appeals. The Sixth Circuit in *Sutton* reasoned that because the same evidence at trial supported both the RICO substantive and conspiracy convictions, the convictions must be merged for purposes of sentencing. In our brief in opposition in this case (Br. 25-27), we contended that the Court need not resolve the conflict among the circuits on this question. We observed (Br. 27) that, in light of subsequent developments, the Sixth Circuit might reconsider its decision in the *Sutton* case.*

On January 23, 1987, the Sixth Circuit decided *United States* v. *Callanan*, No. 86-1140, in which the court abandoned the rationale of its decision in the *Sutton* case. In *Callanan* the court of appeals held that concurrent sentences may be imposed for convictions under the RICO substantive and conspiracy provisions. The court observed (slip op. 2) that this question turns on whether "Congress intended a defendant's conduct to be punishable under both provisions." Consistent with the analysis applied by all of the other circuits that have addressed the issue (see Br. 26), the court of appeals first considered (slip op. 2-3) whether, under this Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the substantive and conspiracy offenses each required proof of a fact that the other did not. The court answered this question affirmatively (slip op. 3). The court next reviewed (*id.* at 3-6) the legislative history of the RICO provisions, discerning in that history "Congress'

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*Our opening brief in opposition in this case also responded to the petition of Thomas E. Marotta, No. 85-1883. On October 14, 1986, the Court denied certiorari as to petitioner Marotta. We have, accordingly, deleted his name from the caption in this brief.

intent to allow punishment under both §§ 1962(c) and 1962(d)" (*id.* at 5). The court expressly rejected (*id.* at 6-7) the argument—crucial to its earlier holding in *Sutton*—that because the proof at the trial in this case had been the same for both offenses, there could not be separate punishments. "[T]he relevant inquiry," the court held (*ibid.*), "examines the proof necessary to establish the statutory elements."

To be sure, the *Callanan* case by its terms resolved only the availability of *concurrent* sentences for RICO conspiracy and substantive convictions. But in deciding that question the court of appeals made clear that its reasoning applies equally to the question of consecutive sentences. The court cited (slip op. 4-5) *United States* v. *Sutton*, 700 F.2d 1078 (6th Cir. 1983) (*Sutton II*), and *United States* v. *Rone*, 598 F.2d 564 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980), for the proposition that consecutive sentences may be imposed for a RICO charge and a predicate offense. The court concluded (slip op. 5) that under its analysis in the present case "Congress' express purposes in enacting RICO suggest the same conclusion * * * concerning conspiracy to violate and actual violation of RICO proscriptions."

The *Callanan* case thus represents a rejection of *Sutton* by the Sixth Circuit, in favor of the contrary analysis applied by the other courts of appeals. Accordingly, there is no longer any real conflict among the circuits on the seventh question presented.

For the reasons set forth in this supplemental brief and in our main brief in opposition, the petitions for a writ of certiorari should be denied.

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SUPPLEMENTAL BRIEF FOR PETITIONER, RENE PICCARRETO

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SUPPLEMENTAL BRIEF
FOR THE PETITIONER,
RENE PICCARRETO

The first and second questions presented in this petition concern the validity of traditional 'double jeopardy' analysis when applied to successive RICO prosecutions.

In 1976 the petitioner was indicted for being a member of an enterprise, i.e. the "Rochester mob". The underlying predicate acts in the 1976 indictment included several arsons that were allegedly part of an insurance fraud scheme. As set forth in the petition, a person named Massaro was a prime mover in this scheme. Later, Massaro was murdered. The two informants who provided the information on this alleged scheme also provided information as to the causes and participants in the murder of Massaro. These two claimed that the same enterprise that ran the insurance/fraud scheme ordered the killing of Massaro because he was talking about the insurance/fraud scheme. It was also alleged that the petitioner was involved. For reasons known only to the authorities, the Massaro murder was not included as a predicate act in the 1976 RICO indictment.

The petitioner was tried and acquitted on the 1976 indictment.

In 1982, the petitioner was charged with a second RICO indictment. Most of the underlying predicate acts in the indictment involved new charges (post 1978) concerning the alleged competition between rival forces for control of the illegal gambling business in the Rochester area. However, also included as an underlying predicate act, was the 1973 murder of the aforementioned Massaro.

The petitioner sought to have this part of the 1982 indictment expunged on grounds of double jeopardy. The petitioner argued

that the second prosecution should have been barred from using the Massaro homicide as a predicate act since the government knew of the allegations at the time of the return of the 1976 indictment. Since the charges could have been included in the 1976 RICO indictment, but weren't, the acquittal on the 1976 RICO should have acted as a bar to that part of the 1982 indictment which included any predicate acts that were known to the government at that time and were related to the affairs of the enterprise. This rule would prevent the government from 'holding back' predicate acts, so as to bring multiple RICO charges against a defendant who is acquitted after trial on the first indictment (see petition).

In an interlocutory opinion, *United States v. Russotti,* 717 F.2d 27 (CA2 1983), the Second Circuit rejected the defense argument and held that the 1982 RICO indictment presented no double jeopardy problems for the prosecution. The basis for the rejection was the court's acceptance of the government's representation, without the benefit of a hearing, that two separate schemes were involved: one, the insurance/fraud scheme; and the other, the gambling club/extortion scheme. The government stated that the **"two schemes were totally unrelated, and therefore, the government could not have included the charges in the first indictment even if they wanted to."** The Court accepted this argument but issued a warning:

> "we are not insensitive to the appellants' concern that the government may be free to pursue successive prosecutions under RICO by merely alleging two predicate acts . . . and, by holding in reserve other predicate acts, bring future RICO prosecutions against participants in the same enterprise . . . However, the 1982 indictment includes the Massaro murder as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its extortion scheme — **a scheme which had no relationship to the 1976 arson-for-hire activity."** *Russotti,* supra at 34.

In other words, the court construed the pattern requirement of RICO in a conservative fashion. Although the predicate acts were committed by the same enterprise and were related to the affairs of that enterprise, the court held that the acts were not related enough to have included them in the same RICO indictment.

The purpose of this supplemental brief is to bring to this Court's attention a recent Second Circuit case that contradicts the *Russotti* holding. In *United States v. Ianniello,* 808 F.2d 184 (CA2 Dec. 1986), the Second Circuit held that the RICO pattern element does not require anything more than two racketeering acts. The acts need not be related by a common scheme and need not involve more than one transaction, id. at 190-192. In so holding, the court reaffirmed the theory set forth in *United States v. Weisman,* 624 F.2d 1118 (CA2 1980) that any concern for relatedness and continuity is supplied by the enterprise element and the nexus of the racketeering acts to the enterprise: "we hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied." *Ianniello,* supra at 192.

CONCLUSION

Clearly, the 1973 Massaro homicide could have been included in the 1976 RICO indictment. If this is true then the court's rationale for its interlocutory holding is fatally flawed. When the government is aware of underlying predicate acts, it has the choice of picking and choosing which acts to include. Once the choice is made, however, the government may not then bring successive RICO prosecutions following an acquittal, based on acts

that could have been included in the first indictment. To do so violates the Fifth Amendment principles of double jeopardy and fundamental fairness.

The holding in *Ianniello* contradicts the rationale of the interlocutory holding in *Rossotti.* In addition, footnote 14 in the *Sedima* opinion (*Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 US-, 87 L.Ed. 2d 346, 358, 105 S.Ct. - (1985)) leaves the law concerning a RICO 'pattern of racketeering activities' unclear. Because of the expected continuation of RICO indictments, the petition for a writ of certiorari should be granted to provide guidance to the trial courts on the 'pattern' requirements of RICO and to correct the violation of Fifth Amendment rights suffered by this petitioner.

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